IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 467 OF 2004
IN
TESTAMENTARY & INTESTATE JURISDICTION

PETITION NO. 540 OF 1989
IN
TESTAMENTARY SUIT NO. 71 OF 1989

1. Smt. Pushpa Prabhashchand Jain aged 52 yrs., of Bombay Indian Inhabitant R/a. House No.44, Ujhedi (Alpura) Etawah-206001 (Uttar Pradesh)

2. Smt.Asha Virendra Kumar Jain, aged 42 yrs of Bombay, R/a. Room No.14, 1st Floor, 24-A, Sukhanand Chawl, C.P.-Tank, Bombay 400 004.

3. Smt. Sudha Premchand Jain aged 39 yrs of Bombay, R/a. 105 B, Sai Ratnam, B.P.Road, Bhayander (E), Bombay- 105.

4. Smt. Prabha Satishchand Jain, aged 34 yrs, of Delhi Indian Inhabitant, r/a. House No.2603, Chatta Pratap Kinari Bazar, Delhi -110 006.

5. Smt. Ranjana Ashokkumar Jain aged 31 yrs., residing at Messers Singhai Medical Stores Maratha Market Daulat Ganj, Gwalior 474 001 (M.P.), Nos.1,3, 4 and 5 by their constituted Attorney,the said Asha Virendra Kumar Jain.

.. Appellants. (Org.Defendants)

V/s.

RAKESH PHOOLCHAND JAIN,adopted son of the abovenamed deceased, Hindu

.. Respondent. (Org.Plaintiff)

Inhabitant of Bombay, R/a.24-B,)
Sukhanand Chawl Khattar Galli,C.P.-)
Tank, Bombay 400 004, a Legatee &)
main beneficiary named in the Will)
of the said deceased.)

Mr.A.S.T.Zaidy with Ms.Tasneem Zaidy i/by M/s.Zaidy & Co. for the Apepllants.

Mr.R.V.Govilkar with Mr.G.S.Pikale i/by M/s.S.V.Pikale & Co. for the Respondent.

CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATED : 07TH DECEMBER, 2006.

ORAL JUDGMENT : (Per S.A.BOBDE,J)

. This Appeal is by the original defendants against the judgment and order of the learned single Judge, granting Letters of Administration to the Respondent -Rakesh Phoolchand Jain in respect of the last Will and testament of Smt.Kusumbai Phoolchand Jain dated 03.12.1986.

2. The Testatrix -Kusumbai died at Bombay on 24.04.1988. She left the Will in Hindi dated 03.12.1986 without appointing an executor. The respondent is the main beneficiary of the Will. He appears to have lived with Kusumbai throughout for about 35 years. The respondent appears to have been adopted by Kusumbai,

hereinafter referred to as the Testatrix, because he is a son of one of the Kusumbai's daughters. Kusumbai had seven daughters, who were married.

3. By the Will the Testatrix has bequeathed her immovable properties to the Respondent who is described as her adopted son and her grandson -Mohit. The bequest in favour of Mohit is a building "Ful Mahal in Mumbai". The other immovable properties including those in Bhind (M.P.) have been bequeathed to the Respondent. The business which she was carrying on in partnership with Rakesh has been bequeathed to him. There is a bequest of Rs.25,000/- in favour of seven married daughters including the Appellant and a direction to the Respondent to give gifts upto Rs.10,000/- on the occasion of the marriages of the children of her daughters.

4. The caveatrix -Asha V. Jain, the Appellant No.2, herein, is one of the married daughters of Kusumbai. She resisted the respondent's petition for grant of letters of administration by filing the caveat on 8th December, 1989. She was thus treated as a defendant. Her main contentions in the caveat were that the respondent is not the adopted son of the Testatrix and that there are suspicious circumstances surrounding

the execution of the Will, namely, that the deceased was bedridden since 1984; she was illiterate and had no intention to bequeath all the property in favour of the petitioner. Further, according to the caveatrix, the respondent was inducted as a partner in the business by the deceased after the death of her uncle Shri Shekharchand Pyarelal Jain and did not pay her share of profits to the deceased. The deceased then fall seriously ill, having contracted Parkinson's disease. The respondent did not take care of the deceased and his conduct seriously affected her health adversely. The deceased then lost her eye -sight due to cataract and her senses such as her understanding and her memory suffered progressively. Since she was totally bedridden from 1984 onwards, she was not capable of understanding and making or executing any legal document such as the Will in question.

5. The caveatrix specifically alleged that the signature of the deceased on the Will was not voluntarily made in the sense that it appears to have been taken by guiding her hand on the alleged document. Similarly, according to the caveatrix, the thumb impression of the deceased was taken on the document involuntarily. For the reasons stated above, the Will was not a Will of the deceased and is null and void.

6. It must be noted at the outset that the Will is a typewritten document in Hindi. The testatrix had put her signature at the end of the Will and her right hand thumb impression and signature appear on each page of the Will. The document is signed by two attesting witnesses, namely, Dr.Asmita Shah (PW-1) and Dineshkumar Rawal (PW-2). These witnesses were also examined by the Respondent.

7. We may now examine the circumstances surrounding the execution of the Will to see if indeed they are suspicious as alleged by the appellants. The learned single Judge has cleared the Will from suspicious circumstances surrounding its execution.

8. According to the appellant, the testatrix was ill and was physically and mentally incapable of executing the Will or giving instructions for the preparation of the Will. She had lost her eyesight due to cataract and her understanding and memory was impaired. Since she was totally bedridden from 1984. She was not of sound disposing state of mind from 1984 till she expired on 24.04.1988.

9. As regards the alleged suspicious circumstances

surrounding the execution of the Will, the contention of the appellants is that the thumb impression of the deceased has been taken involuntarily on the document and therefore, it cannot be said to be the will of the testatrix. It is noteworthy that it is not the case of the appellant that the signature is not that of the testatrix. According to the appellant, the language of the Will is not that of the testatrix but is of somebody acquainted with the law, who has, however, not been examined. The person who typed the document has also not been examined. The appellants further contended that there is some suspicion even as to the time when the Will was executed; since Dr. Asmita Shah deposed that the time of the execution of the Will was in the evening and the other attesting witness stated that it was in the morning.

10. The contents of the Will are challenged on the ground that the testatrix could not have intended to bequeath all the property in favour of the respondent alone who was born as a grand-son of the testatrix and was not adopted by her. There is also a bequest in favour of the respondent’s son.

11. The contentions of the appellants may now be examined. In the first instance, it appears to us from

the evidence that there is no effective denial of the respondent's assertion that he was the adopted son of the deceased. No evidence has been adduced by the Appellants to disprove the respondent's assertion. The respondent has been described as an adopted son in the Will itself. In fact it appears to us from the evidence that the respondent and his son were living with the deceased since his childhood in the same house and did so right upto the time she died on 24.04.1988. It is therefore, not unnatural for the testatrix to have decided to bequeath her immovable property and business to the respondent. In fact the respondent was a partner in the business with the testatrix. Also the bequest to the grandson is equally natural. It may be remembered that all her seven daughters were married and they appear to have been well settled and living with their husbands, except the Appellant-caveatrix, who has been living on her own. The bequest is, therefore, not only not in favour of a stranger but in favour of a person who lived as a son along with his family with the testatrix throughout. It must be noted that the testatrix has nonetheless made a monetary bequest in favour of her daughters by the will. She has stated in the will that she alongwith her husband had incurred considerable expenses for their marriage earlier and had made the customary gifts thereafter. This clearly shows

that the testatrix did not exclude the daughters from consideration while making the will but considered it appropriate to bequeath the property to the respondent and his son, who she appears to have brought up. It is common in this country for parents to incur all the necessary expenses for settling their daughter well and treat it as a responsibility well discharged and then to bequeath the family property to their son and his children. The testatrix seems to have adopted this course.

12. This brings us to the condition of the testatrix and the consideration of whether she was in a disposing state of mind. The evidence on record shows that the deceased was capable of movement on her own. She was not bed-ridden before her death even according to the family doctor. She had undergone an operation to remove cataract from her eyes and she wore thick glasses after operation. She appears to have had suffered from impaired memory, apparently due to the Parkinson's disease and her senses such as vision, hearing and understanding were impaired. However, none of these appear to us as indicative or proof of the allegations that she did not understand what she was doing or she was not capable of disposing her property.

13. The condition of her health at the time of the execution of the Will, has been deposed to by the attesting witnesses Dr. Asmita Shah (PW-1). Dr. Ashmita Shah told the court that she was the family doctor of the testatrix and was called on 03.12.1986 by the respondent as desired by her at about 6 p.m. When she reached the place, Mr. Dineshkumar Rawal (PW-3) was already there. This witness has clearly narrated the circumstances in which the testatrix executed the Will. This witness stated that she examined the deceased Kusumbai and found that she was physically fit and of sound mind, memory and understanding. The testatrix then told her that she wanted to execute the Will in Hindi and showed the document to her and Mr.Dineshmukar Rawal. In fact these witnesses asked the deceased whether she had gone through the Will and whether she finds its contents to be correct, to which the testatrix replied in the affirmative. These witnesses then deposed to have seen the deceased subscribe her name and right hand thumb impression at the foot of the testament in Hindi. She also identified the document at Exh.‘A’ and the signature by right hand thumb impression on it. We find from the cross-examination that there is no effective rebuttal to the substance of the deposition of these witnesses. In the cross -examination she specifically stated that the testatrix was not bedridden

even before her death later. In fact she was sitting in the house and not lying down. She further asserted that she signed as an attesting witness after the testatrix had put her own signature. Having regard to the fact that she was a family doctor and knew the deceased for a long period of time personally as well as professionally, we find it entirely natural for this witness to have been called upon by the deceased as an attesting witnesses and her testimony seems to be reliable. The other attesting witness Dineshmukar P.Rawal entirely corroborates the version of the Dr. Asmita Shah as regards the execution of the Will and the circumstances in which it was executed. Dr. Shah, as noted above, has deposed as to the soundness of the state of mind of the testatrix which even according to this witness was sound. Both these witnesses have deposed to the fact that the testatrix executed the Will of her own free will and without any coercion. Apart from the discrepancy in the time when these two witnesses said they were called to the house of the deceased; the evidence of these two witnesses harmonises with each other and appears to be reliable and trustworthy. The learned trial Judge who heard the evidence has noted the fact that the discrepancy in time may have arisen due to the long lapse of time between the execution of the Will and deposition of the

witnesses in the court. In any case we do not consider that discrepancy serious enough, warranting discredit of the evidence of either of the witnesses. The execution of the Will in question is thus in accordance with section 63 of the Indian Succession Act, 1925 which reads as follows :

> 63. Execution of unprivileged Wills.-- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, (or an airman so employed or engaged) or a mariner at sea, shall execute his Will according to the following rules:-
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time,

> and no particular form of attestation shall be necessary."

14. Mr.Zaidy, the learned counsel for the appellant relied on the testimony of D.W.2- Dr.Kapoor, who treated the testatrix after her cataract operation. This doctor has stated that since the deceased had a marked loss of vision and could not move on her own, she could not be said to be physically and mentally fit. This statement does not impress us enough to hold that the deceased did not have a sound disposing mind at the time of execution of the Will about a year after Dr. Kapoor first treated her. The evidence of the attesting witness Dr.Shah is more relevant and convincing in this regard.

15. The Will is thus executed by a person of sound mind and the disposition is legal and not in breach of Explanation 4 to section 59 of the Act, which reads as follows :

> 59. Person capable of making Wills.-- Every person of sound mind not being a minor may dispose of his property by Will.
>
> Explanation 1. .....
> Explanation 2. .....
> Explanation 3. .....
>
> Explanation 4.-- No person can make a Will while

> he, is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.
>
> Illustrations
>
> (i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his Will. A cannot make a valid Will.
>
> (ii) A executes an instrument purporting to be his Will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid Will.
>
> (iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property makes a Will. This is a valid Will.

16. As regards the contents of the Will it was strongly urged by the counsel for the appellants that there is a serious doubt as to authorship of the Will. According to the counsel and he seems to be right in so saying, that the Will has been drafted by the person who seems to be aware of law. It is clear from the evidence that the Will was kept ready by the deceased when the attesting witnesses visited her. Therefore, according to the learned counsel for the appellant, the Will is suspicious ipso facto, since neither the person who drafted the Will or the person who typed it were

examined. It may be true that the Will might be in the language of some one familiar with law and might have been drafted by a lawyer. There is no evidence that the testatrix had typed it herself. None of these facts, however, persuade us to conclude that the Will could not have been the result of the instructions of the testatrix herself. She was not surely an illiterate lady who did not know how to conduct her affairs. In fact, she had been in business for some time and was perfectly capable of asking a lawyer or some such person to draft the Will. In fact it appears from the suggestion of the Appellants' counsel that the deceased had a legal adviser by name Shantaram Venkatrao Pikle. In any case, having regard to the clear evidence that the deceased had the document ready in her hand and told the attesting witnesses that it was her Will which she intended to execute and the fact that she further, executed the Will in their presence and later on even went to the Registrar's office to have it registered, we are not inclined to attach too much importance or weight to the fact that the persons who had drafted it or typed it were not examined by the respondent. It must be noted that it was not even suggested by the Appellants in the cross-examination of the respondent or in either witnesses that the respondent got the Will drafted, according to his intention and then got the testatrix

merely to execute it without understanding. We thus find that the Will cannot be treated as void under section 61 of the Indian Succession Act, which reads as follows :

> "61. Will obtained by fraud, coercion or importunity.-- A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.
>
> Illustrations
>
> (i) A, falsely and knowingly, represents to the testator, that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, A's favour; such Will has been obtained by fraud, and is invalid.
>
> (ii) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.
>
> (iii) A, being a prisoner by lawful authority, makes his Will. The Will is not invalid by reason of the imprisonment.
>
> (iv) A, threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.
>
> (v) A, being of sufficient intellect, if undisturbed by the influence of others, to make a Will yet being so much under the control of B that he is not a free agent, makes a Will dictated by B. It appears that he would not have executed the Will but for fear of B. The Will is invalid.

> (vi) A, being in so feeble a state of health as to be unable to resist importunity, is pressed by B to make a Will of a certain purport and does so merely to purchase peace and in submission to B. The Will is invalid.
>
> (vii) A, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a Will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition makes his Will in the manner recommended by B. The Will is not rendered invalid by the intercession and persuasion of B.
>
> (viii) A, with a view to obtaining a legacy from B, pays him attention and flatters him and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery makes his Will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A."

17. Apart from being satisfied that the execution of the Will is free from suspicious circumstances, we do not find anything in the contents of the Will which casts any suspicion on it. It is true that the respondent and his son are the main beneficiaries under the Will. As regards money, the married daughters have received about 25,000/- rupees under the Will. Having regard to the circumstances of the family of the testatrix, we are not inclined to question the genuineness of the Will on this ground. There is no doubt that the respondent was actually treated like a son by the testatrix and that he lived with her right

from his childhood. She appears to have trusted him enough to induct him in the business also like any mother would. It is also correct, as is normally known, that all the daughters were not living with the testatrix having left the family upon their marriages. Having regard to the fact that the testatrix must have spent on the marriages, expenses and gifts at the time of marriages and having thus discharged her obligation towards her daughters, as stated in the Will itself, it is not at all unnatural for a lady in this situation to bequeath most of her property to her son i.e. the respondent and his son.

18. In this regard, it may be noted that the Supreme Court has, in AIR 2002 Supreme Court 317, held that the uneven distribution of assets between the children cannot be taken as suspicious circumstance. Nor, as held by the Supreme Court in AIR 2005 Supreme Court 4362, the depriving of natural heirs must be treated as suspicious because it is normally the intention of a testator to interfere with normal line of succession while making a Will.

19. In a leading case on the construction and proof of Wills in **H.Venkatachala Iyenger vs. B.N.Thimmajamma & Ors., reported in A.I.R. 1959 Supreme Court 443,** the

Supreme Court observed in paragraphs 18, 19 and 20 as follows :-

> "(18) What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S.67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witneses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be

decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by S.63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

(19) However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator’s mind and his signature as required by law. Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

(20) There may, however, be cases in which the execution of the will may be surrounded by

> suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

We have arrived at the conclusion in this case after having borne in mind the above observations of the Supreme Court.

20. Thus having regard to the proof of the execution of the Will and the circumstances surrounding its execution which we do not find to be suspicious, we find

no reason to interfere with the order of the learned trial Judge.

21. We,accordingly, dismiss the Appeal.

(R.M.LODHA,J.)

(S.A.BOBDE,J.)

.....